88-1330

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GETTY PETROLEUM CORP.,

Petitioner,

– against –

SALEM HEAT & PETROLEUM CORP.
and LEWIS CAHILL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether it constitutes a deprivation a party's right to a trial by jury pursuant to the Seventh Amendment of the United States Constitution for an appellate court to vacate a punitive damage award as excessive and remand the case to the district court for it to assess punitive damages in an amount not to exceed a circumscribed sum.

2. Whether review of a jury verdict may be constitutionally reversed as excessive on the grounds that it is "so high as to shock the judicial conscience and constitute it denial of justice."

3. Whether a punitive damage award may be reversed on the grounds that it is disproportionate to the compensatory damage award.

4. Whether a Federal Court is authorized to charge punitive damages in an

appropriate case pursuant to the Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051, et seq.

PARTIES

Getty Petroleum Corp., plaintiff (petitioner in this Court, also referred to as "Getty"), Island Transportation Corp., defendant, Skybolt Auto Service, Inc., defendant, Vito P. Gerbino, defendant, Vincent R. Gerbino, defendant, Thunderking, Inc., defendant, Tri-Star Brokers, Inc., defendant, Turgot Ozen, defendant, Salem Heat & Petroleum Corp., defendant (respondent in this Court, also referred to as "Salem"), and Lewis Cahill, defendant (respondent in this Court, also referred to as "Cahill"). There are no affiliated companies nor subsidiary companies of Getty, except wholly owned subsidiaries.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Getty Petroleum Corp., ("petitioner" or "Getty"), respectfully prays that a writ of certiorari issue to review so much of

the judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1988, as vacated the award of punitive damages under § 35 of the Lanham Act, based on its determination in Getty Petroleum Corp. v. Bartco Petroleum Corp., 858 F.2d 103 (2d Cir. 1988) ("Getty I") that punitive damages were unavailable under the Lanham Act, and remanded the case to the District Court for its determination of the availability of punitive damages under Getty's state law causes of action. On remand, the Court of Appeals propounded the following three questions to the District Court, whether: (1) plaintiff's non-Lanham Act claims were still alive at the close of trial; (2) punitive damages may be awarded under the law of New York for

those claims; (3) plaintiff had proved its state law causes of action. Upon so finding the District Court was instructed to enter judgment for punitive damages in an amount not to exceed $250,000, stating that "there is no need for a third jury trial".

The determination of a maximum amount of punitive damages by the Court of Appeals denied Getty a jury trial on that issue pursuant to its state law claims. A petition for rehearing was denied on December 5, 1988. The decision of the Second Circuit was issued as a mandate on November 14, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 862 F.2d 10 (2d Cir. 1988), and a copy thereof is annexed hereto as Appendix A. The

opinion of the District Court for the Eastern District of New York, dated March 4, 1988, is not officially reported. A copy thereof is annexed as Appendix B. The Memorandum of Decision of the District Court upon the remand determining in the affirmative the three questions propounded by the Court of Appeals and awarding $250,000 in punitive damages, dated January 12, 1989, is not officially reported and is annexed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1988. A copy of that judgment is annexed hereto as Appendix D. The petition for rehearing was filed and was denied by order of the Second Circuit entered on December 5, 1988. A copy of that order is annexed hereto

as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within the time allowed by law.

CONSTITUTIONAL PROVISIONS AND STATUTES

The statutory provisions involved in this petition are the Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq., 1114(1), 1116-1118, and 1125(a), which are set forth in Appendix F; and the Seventh Amendment to the United States Constitution which is set forth in Appendix G.

STATEMENT OF THE CASE[1]

Getty initiated this action in the United States District Court for the Eastern District of New York. The complaint alleged the sale of non-Getty gasoline by two Getty gasoline stations in New York (the "Middle Village" and "Garden City Park" stations). (A 50-62)[2] Getty's claims arise under the Lanham Act for

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[1]The Second Circuit, in its reported decision, referred to this case as Getty II and to its companion case, Getty Petroleum Corp. v. Bartco Petroleum Corp., 858 F. 2d 103 (2d Cir. 1988), as Getty I. Getty I was decided on September 22, 1988 and Getty II on October 20, 1988.

[2]Numbers in parenthesis preceded by the letter "A" refers to the Joint Appendix submitted to the Court of Appeals. References to one of the Appendixes submitted to this Court along with this petition will be identified as "Appendix A", "Appendix B", etc., followed by a number representing the page.

trademark infringement (Count I) (A 53-58); unfair competition by means of false designation of origin, false description and false representation (Count II) (A 58-59); unfair competition under the common law (Count III) (A 59); dilution of the trademark value under New York State law (Count IV) (A 59); and false advertising under New York State law (Count V) (A 59-60).

Respondent, Salem, is a gasoline distributor owned and operated by respondent, Cahill. Getty charged Salem and Cahill with contributorily infringing upon Getty's trademark by actively soliciting the sale of gasoline to the Middle Village and Garden City Park stations with knowledge that the operators of those Getty brand stations would then resell the

Salem supplied gasoline to the public under the Getty brand as if it were Getty supplied gasoline. (A 56)

In this case, as distinguished from Getty I, the plaintiff did not withdraw any causes of action, legal theories or claims. As in Getty I, however, there were two jury trials. At the first trial, held on November 23, 1987 through December 1, 1987, the jury found that the respondents engaged in contributory infringement of the Getty trademark "knowingly, intentionally, maliciously and with a callous disregard for the rights of Getty and its trademark". (Appendix B 6) It awarded punitive damages against both respondents in the sum of $875,000. (Appendix B 5, A 380).

The respondents moved for judgment notwithstanding the verdict

("judgment n.o.v."). The District Court set aside the punitive damage award against respondents, finding it so high that "it shocks the conscience of the court." Getty declined the Court's offer to remit the award of punitive damages in excess of $100,000, and elected instead to have a second jury hear the issue. (Appendix B 13)

On February 29, 1988 through March 3, 1988, the District Court held a second jury trial solely on the issue of punitive damages. The second jury returned a verdict awarding punitive damages against respondents in the higher amount of $1,000,000. (Appendix B 13, A 1748). Respondents again moved for judgment n.o.v., claiming that the second verdict was also excessive. The District Court

denied the motion, finding the evidence presented at the second trial sufficient to support the higher verdict. (Appendix B 13) The Court awarded Getty attorney's fees for the first trial in the sum of $55,521.15 (Appendix B 23) and for the second trial in the sum of $78,605.46. (A 1791)

The Court of Appeals for the Second Circuit, following its decision in Getty I, vacated the punitive damage award to the extent that it was based on the Lanham Act, and remanded the case to the District Court, to consider whether punitive damages were available under Getty's non-Lanham Act causes of action. The decision directed the District Court to determine whether: (1) Getty's non-Lanham Act claims were still alive at the

close of the trial; (2) punitive damages may be awarded under the law of New York for those claims; (3) Getty proved its state law causes of action. (Appendix A 8-9)

In its decision, the Court of Appeals found that "there is no need for a third jury trial in this matter". (Appendix A 9-10) It directed the District Court to enter an award of punitive damages not to exceed $250,000, "since any larger amount than that would be 'so high as to shock the judicial conscience' and constitute a denial of justice." (Appendix A 9) Petitioner seeks review of that decision, which deprived Getty of its right to a jury trial in violation of the Seventh Amendment to the United States Constitution.

Plaintiff also asks that this Court, as in Getty I, review the Second Circuit's determination that punitive damages may not be awarded in a Lanham Act case. (Appendix A 7) As a consequence of that ruling, Getty lost attorney's fees previously awarded for the second trial in the sum of $78,605.46, as the District Court ruled attorney's fees were not available under New York State law on its non-Lanham Act claims. (Appendix C 12-13)

On January 12, 1989, on remand, the District Court answered in the affirmative all three questions referred to it by the Court of Appeals and judgment was entered awarding Getty $250,000 in punitive damages against the respondents. (Appendix C 12-13) The District Court offset the

attorney's fees awarded at the second trial against the punitive damage award. (Appendix C 13)

REASONS FOR GRANTING THE WRIT

POINT I

GETTY'S CONSTITUTIONAL RIGHT TO A TRIAL BY JURY HAS BEEN VIOLATED

The Court of Appeals abridged petitioner's constitutional right to a jury trial on the issue of the amount of punitive damages, limiting petitioner's right to recover punitive damages to no more than $250,000.00. The Seventh Amendment states:

> In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

In this case two juries awarded punitive damages of approximately the

same magnitude. Nevertheless, the Second Circuit usurped the role of finder of fact, disregarded both jury awards and imposed an amount of its own choosing.

The protection of the Seventh Amendment extends to all actions at law seeking money damages and is fully applicable to trademark infringement actions, as this Court held in Dairy Queen v. Wood, 369 U.S. 469 (1962). In Dairy Queen the Court upheld plaintiffs' right to trial by jury on both breach of contract and trademark infringement claims for money damages, noting that "we think it plain that their claim for a money judgment is a claim wholly legal in its nature however the complaint is construed." 369 U.S. 469, 477. The Court determined that the existence of equitable

claims in no way impinges upon a plaintiff's right to a jury trial on the legal claims in the case and that the categorization of a remedy as one for an "accounting," does not alter its essential nature as one for damages, where the accounting required is not too complicated for a jury's determination. Under New York State law the issue of exemplary damages belongs to the trier of fact -- in this case properly the jury. Walker v. Sheldon, 10 N.Y.2d 401, 223 N.Y.S.2d 488 (1961); Nardelli v. Stanberg, 44 N.Y.2d 500, 406 N.Y.S.2d 443, 377 N.E.2d 975 (1978).

The Second Circuit denied Getty a jury trial on the issue of the amount of punitive damages under New York law by stating, "there is no need for a third jury trial in this matter",

resting its decision on its belief that "all the facts are before the district court on the trial record." (Appendix A 9) Even if that were true, it would not justify preemption of the jury's function as finder of fact. The trial court found upon the remand that Getty was entitled to punitive damages under New York law and did enter a judgment in the amount of $250,000. After the Court determined that Getty was entitled to punitive damages, the issue of the amount of punitive damages should have been submitted to a jury. The Court of Appeals thus abridged Getty's Seventh Amendment right to a trial by jury.

A. JURY AWARDS MAY NOT BE REVIEWED FOR EXCESSIVENESS WITHOUT AT LEAST PRESERVING THE PREVAILING PARTY'S RIGHT TO A NEW TRIAL OR TO A NEW TRIAL CONDITIONED UPON DECLINING A REMITTITUR

Although this Court has noted that "[a]ppellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment," Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48, 53, f.n. 5 (1954), it has in the past declined to define the limit governing appellate review of the size of jury verdicts. Grunenthal v. Long Island Railroad Co., 393 U.S. 156, 158 (1968); Neese v. Southern Railway Co., 350 U.S. 77, 78 (1955). In this case, the United States Court of Appeals for the Second Circuit exceeded even the limits it had previously set for itself, by failing to offer the petitioner the option of a new trial, were petitioner

to decline the remittitur. The Court's direction that the District Court assess punitive damages in an amount not to exceed $250,000 raises a substantial question of federal constitutional law as to whether a court of appeals' power to review a jury verdict for excessiveness includes the right to mandate a maximum recovery, to be imposed by the district court judge, rather than jury, consistent with the Seventh Amendment of the United States Constitution.

After this Court's decision in Neese, the Second Circuit considered its power to review a verdict on "the sole ground that [it] was too high," Dagnello v. Long Island Railroad Co., 289 F.2d 797, 798 (2d Cir. 1961), noting that "[t]his question the Supreme Court has expressly reserved

for future determination." 289 F.2d 797, 801, citing Neese. After an exhaustive review of the state of the law at that time, the Dagnello court found near unanimity among the circuits and the fifty states in allowing some appellate review of the size of a verdict for excessiveness. 289 F.2d 797, 799, f.n. 1, 802. The Second Circuit concluded that "there is no constitutional obstacle to the exercise by a federal Court of Appeals of the power to review the exercise of discretion by the trial judge in refusing to set aside a verdict for excessiveness, and to resort to remittitur in proper cases . . ." 289 F.2d 797, 804.

This Court, in Grunenthal, although still not reaching the ultimate question, noted that it read

Dagnello "as requiring the Court of Appeals . . . to make a detailed appraisal of the evidence." 393 U.S. 156, 159. In Grunenthal, a jury had awarded a verdict of $305,000 on appeal. The Second Circuit ruled that it could not "in any rational manner consistent with the evidence arrive at a sum in excess of $200,000," and remanded the case for a new trial unless the plaintiff accepted a remittitur. Grunenthal v. Long Island Railroad Co., 388 F.2d 480, 484 (2d Cir. 1968). This Court, noting that the Court of Appeals had failed to make the detailed appraisal of the evidence mandated by its earlier decision in Dagnello, "made [its] own independent appraisal of the evidence," and sustained the jury award. Grunenthal, 393 U.S. 156, 160.

In this case, the Court of Appeals made almost no analysis of the relevant facts. Noting only that defendants claimed that the $1,000,000 jury award constituted "approximately fifty percent of their net worth and is likely to ruin them financially," and that "there is no mathematical formula to compute punitive damages," the court found "the ratio of compensatory damages . . . [to be] grossly disproportionate." (Appendix A 9)

Following that most cursory analysis of the facts, the Court concluded that any award of punitive damages greater than $250,000 would be "'so high as to shock the judicial conscience and constitute a denial of justice' [citation omitted]." (Appendix A 9) In doing so, the court substituted its own judgment not only

for that of the two juries who had heard the case, but for that of the trial judge who had, after what the court granted constituted careful review of the "additional evidence regarding punitive damages presented at the second trial . . . declined to vacate this award, as he had after the first trial." (Appendix A 6)

The Second Circuit, in this case, therefore, went further than the circumstances left open by this Court in Grunenthal and Neese, and plainly violated the Seventh Amendment, which limits appellate review of jury decisions to review available "according to the rules of the common law." Even assuming, arguendo, that the Seventh Amendment allows the Court of Appeals to set aside a jury's verdict at law as excessive, the Court was required,

as Judge Mishler did after the first trial, to offer plaintiff "the option of a new trial in lieu of the remittitur." McKinnon v. City of Berwyn, 750 F.2d 1383, 1391 (7th Cir. 1984).

As this Court observed in Kennon v. Gilmer, 131 U.S. 110 (1889):

> "at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest."

131 U.S. 110, 113 (1889). Accord: Linn v. United Plant Guard Workers, 383 U.S. 53, 65-66 (1966). ("If the amount of damages awarded is excessive, it is the duty of the trial

judge to require a remittitur or a new trial.")

As we noted, this Court left open the question of whether the Seventh Amendment allows appellate review of a determination of the size of a damage award by the trial court. Even accepting the prevailing view that it does, this Court drew the line exactly 100 years ago in Kennon, in which it held that:

> "no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."

131 U.S. 110, 113-114.

By its decision below, the Second Circuit has now crossed that line. By

mandating a reduction of at least 75 percent of the jury's verdict, without offering plaintiff the option of a new trial, the Court of Appeals deprived plaintiff of its right to have a jury decide the question of damages. In so doing, the court came to the unprecedented conclusion that "there is no need for a third jury trial in this matter." (emphasis added) (Appendix A 9-10)

The Second Circuit's ruling may have been based upon the belief that a third jury trial would have ended in a result similar to those of the first two trials. If so, there was even less reason for the Court of Appeals to conclude that the verdict was shocking. While the Court perhaps considered it futile to permit a third trial (followed by a fourth trial,

etc.), until an award the Court would approve of is reached, this conclusion inherently demeans the importance of a jury verdict. Whether the case is tried two times or ten times is not the point. When the voice of the jury speaks and it is the same, a time must come that the Court of Appeals will consider its subjective judgment of an appropriate award unwarranted and yield to the verdict of the jury.

The requirement that the trial court offer plaintiff the option of a new trial is as well established as the right of the trial court to examine the size of the verdict in the first place. Both spring from the common law as it existed at the time of the adoption of the Seventh Amendment. For the lower court now "[t]o effectuate any change in these rules

is not to deal with the common law, qua common law, but to alter the Constitution." Dimick v. Schiedt, 293 U.S. 474, 487 (1934).

Although the practice of conditioning denial of a new trial upon plaintiff's acceptance of a remittitur had been accepted since it was first authorized by Mr. Justice Story, sitting on circuit in Blunt v. Little, 3 (Mason) F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578), this Court's analysis of the common law, as it existed at the time the Seventh Amendment was enacted, led it to the conclusion that it "may be that if the question of remittitur were now before us for the first time, it would be decided otherwise." Dimick v. Schiedt, 293 U.S. 474, 484. In light of the questionable constitutionality of even the

practice of offering remittitur as an alternative to a new trial, the Second Circuit's extension of the practice to an enforced remittitur, without even the option of a retrial before a jury, cannot pass constitutional muster.

If the Circuit Court found the amount of damages excessive, it had only one alternative. Because it possessed no greater authority than the trial judge, it could only have offered the choice between a remittitur or a new trial. Linn v. United Plant Guard Workers, 383 U.S. 53, 65-66 (1966).

The Seventh Amendment entitled plaintiff to receive either the damages awarded it by the second jury or, if it declined a remittitur, a third trial before another jury. The Circuit erred in denying plaintiff that right. This Court should,

therefore, grant this petition for a writ of certiorari to decide whether the Second Circuit correctly ignored the century-old rule of Kennon that appellate courts may not mandate judgment for a sum less than that awarded by a jury.

B. THE DECISION BELOW ESTABLISHED A SHARP CONFLICT AMONG THE CIRCUITS AS TO WHETHER COURTS OF APPEALS MAY IMPOSE A VERDICT WHERE THEY CONCLUDE A JURY VERDICT IS EXCESSIVE

Not only did the decision of the Court of Appeals violate plaintiff's constitutional right to a trial by jury (see Parts A and B, supra), it also established a split between the Second Circuit and most of the other Circuits as to whether an appellate court may mandate a remittitur, without offering a new trial, consistent with the Seventh Amendment. Among the other Circuits, only the

Eleventh is even arguably in agreement with the Second Circuit.

The Eleventh Circuit has reduced a verdict of $250,000 by exactly $36,952.89, finding that, "we cannot find any evidence," to support the additional amount. Quality Foods, Inc. v. U.S. Fire Ins. Co., 715 F.2d 539, 542 (11th Cir. 1983). Since that decision, it has both offered the option of a new trial, T.D.S. Inc. v. Shelby Mutual Ins. Co., 760 F.2d 1520, 1533, rehearing denied, 769 F.2d 1485 (11th Cir. 1985), and noted that "a remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence." Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1448, reh.

denied, 765 F.2d 154 (11th Cir.), cert. denied, 474 U.S. 1005 (1985). The decision in Quality Foods, therefore, may be explained by the fact that the court eliminated a jury award for a sum certain, awarded without any evidentiary support.

The practice of offering plaintiff the option of a new trial or a remittitur is accepted in every other circuit. Keeler v. Richards Mfg. Co., Inc., 817 F.2d 1197, 1202 (5th Cir. 1987); Carter v. District of Columbia, 795 F.2d 116, 135 (D.C. Cir. 1986) ("it is not the district court's prerogative to enter a remittitur by fiat. Instead, the appropriate procedure is to pose to plaintiffs the choice between consent to the reduction and a new trial."); Alley v. Gubser Development Co., 785 F.2d 849,

856-7 (10th Cir.), cert. denied, 479 U.S. 961 (1986); McKinnon v. City of Berwyn, 750 F.2d 1383, 1391-2 (7th Cir. 1984); Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983); Fenner v. Dependable Trucking Co., Inc., 716 F.2d 598, 603 (9th Cir. 1983); Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982); Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 206 (4th Cir. 1982) (remanding for a new trial), cert. denied, sub nom Aetna Casualty and Surety Co. v. U.S., 460 U.S. 1102 (1983), on rehearing on other grounds, 712 F.2d 899 (4th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); Smith v. John Swafford Furniture Co., Inc., 614 F.2d 552, 553 (6th Cir. 1980).

POINT II

THE COURT OF APPEALS APPLIED AN UNCONSITUTIONAL STANDARD IN VACATING THE JURY AWARD

A. "SHOCK TO THE JUDICIAL CONSCIENCE" IS NOT GROUNDS FOR REVERSING A JURY AWARD

It is well settled that great deference should be given to the trial court's determination on a motion for judgment n.o.v. Indeed, this Court, in Grunenthal v. Long Island Railroad Co., 393 U.S. 156 (1968), observed approvingly that "[t]he Court of Appeals regarded its inquiry as limited to determining whether the trial judge abused his discretion in denying the . . . motion." 393 U.S. 156 at 159. The Court of Appeals here did not find that the trial judge abused his discretion. Indeed, it complimented the care with which he reviewed the evidence presented at the

second trial - evidence only concerning the issue of punitive damages. Characterizing the second jury's award of a slightly higher verdict than that of the first jury as "ironic," (Appendix A 6), and ignoring its own implicit conclusion that the District Court had been persuaded by its careful review to agree with the two juries that the high award was appropriate, the Court went on to examine the size of the verdict. The Second Circuit did not find that the District Court abused its discretion in denying respondents motion for judgment n.o.v.

The Second Circuit found that any award to Getty in an amount larger than $250,000 would be "so high as to shock the judicial conscience and constitute a denial of justice." (Appendix A 9) The Court of Appeals

is apparently referring to its own judicial conscience. When that issue was presented to the District Court, it found the second jury award, although $125,000 higher than the first jury award, supported by the evidence and, implicit in its decision, not so high as to shock its judicial conscience or constitute a denial of justice.

The term, "shock to the judicial conscience," as used by the Second Circuit in this case, constituted no standard at all, but rather a mere subjective reaction. While many examples exist of courts utilizing the term "so high as to shock the judicial conscience and constitute a denial of justice," this term may not be utilized as a rule of law by itself, but rather as the conclusion formed after

a court analyzes the record and finds that the jury award could not be supported by the evidence, or resulted from bias, passion or prejudice, or simply resulted from mathematical error. Where courts of appeals dispense with such findings, reviewing verdicts on the grounds of "shock," alone, the standard is unconstitutional. The term, so used, invites an appellate court to substitute its findings for that of a jury, which in fact happened in this case.

Those cases where appellate courts do not limit themselves to "shock to the judicial conscience," but rather analyze the record for sufficiency of evidence, bias, passion or prejudice, or error in calculation, demonstrate that there is no magic in an amount which itself makes an award

"shocking," or "constituting a denial of justice." In Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979) aff'd. in part, rev. in part, 667 F.2d 908 (10th Cir. 1981), jur. postponed, 459 U.S. 1101 (1983), rev., 464 U.S. 238 (1984), reh. denied, 465 U.S. 1074 (1984), on remand, 769 F.2d 1451 (10th Cir. 1985), cert denied, 476 U.S. 1104 (1986), the district court allowed, under the circumstances of that case, an award of $5,000 for actual damages and $10,000,000 in punitive damages to stand. Such an award, the court found, could not be set aside as shocking to the conscience. By contrast, in Collum v. Butler, 288 F. Supp. 918, (N.D. Ill. 1968), aff'd., 421 F. 2d 1257, (7th Cir. 1970), the court found a verdict of $17,500

shocking and ordered a new trial or a remittitur of $11,500.

Those cases which constitute a proper and constitutional review of a jury verdict for excessiveness do not rest, alone, on the court's conclusion of shock to the judicial conscience, but rather, depend upon objective findings within the trial record. Thus, in Jackson v. Magnolia Brokerage Co., 742 F.2d 1305 (11th Cir. 1984), although the court of appeals approved the use of the shock to the judicial conscience standard by the district court, which upheld a total personal injury recovery of $400,000, even though the district court would in its discretion have awarded a total recovery of only $280,000, the district court did not limit its inquiry by that standard. The court of

appeals upheld the district court finding that, "the court cannot say that the difference is indicative of bias, passion, prejudice or corruptness, or, in this day and time that it is totally shocking. It was slightly shocking but not to the extent to evidence bias, passion, prejudice, or corruption," 742 F.2d 1305, 1306.

In Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983), the court of appeals vacated a personal injury award in the sum of $291,309 as excessive, setting the case down for a new trial on damages unless the plaintiff accept a remittitur in the sum of $138,204.39. The court utilized the following standard in reviewing the district court judgment, "[w]e therefore would not set aside a jury's verdict as

excessive unless there was no rational connection between the evidence on damages and the verdict -- unless, in other words, the verdict was 'monstrously excessive.'" 704 F.2d 963 at 971. The court justified its conclusion by a painstaking analysis of the evidence of damages before the district court.

Again, in reviewing awards for pain and suffering, in Arnold v. Eastern Airlines, Inc., 681 F.2d 186 (4th Cir. 1982), cert. denied, sub nom Aetna Casualty and Surety Co. v. U.S., 460 U.S. 1102 (1983), on rehearing on other grounds, 712 F.2d 899, (4th Cir. 1983), cert. denied, 464 U.S. 1040 (1984), the court recognized appellate review of an award for excessiveness is:

> "extremely limited. . . to determine whether a verdict

> is not merely excessive but outrageously or monstrously so, we have recognized that a verdict cannot be so characterized if there is in the record credible evidence with which if accepted by the jury and given its most favorable inferences will support it."

681 F.2d 182, 202.

These cases are all consistent with this Court's decisions in Grunenthal v. Long Island Railroad Co., 393 U.S. 156, 158 (1968) and Neese v. Southern Railway Co., 350 U.S. 77, 78 (1955), where this Court refused to disturb denials by the trial courts of motions for a new trial on the grounds that the verdicts were excessive, as the trial courts' determinations were supported by sufficient evidence.

An appropriate analysis of the phrase "shocking to the judicial conscience" was made by Judge Weinfeld in

Reynolds v. Pegler, 123 F. Supp 36 (S.D.N.Y. 1954), aff'd, 223 F.2d 429 (2d. Cir.), cert. denied, 350 U.S. 846 (1955):

> The fact that a Court may disagree with the jury's award, or had a Court been sitting as the trier of the fact, it would have awarded a lesser sum, is not the test on a motion to set aside or reduce a verdict on the ground of excessiveness. The Court may not substitute its judgment for that of a jury. In general, the authorities are in accord that it is only when the amount awarded shocks the 'judicial conscience' that the court is warranted in interfering with the award (Footnote omitted). This is but another way of saying that before acting the Court must be satisfied that the result is not based upon a rational consideration of the evidence and the proper application of the law. (Emphasis added).

123 F. Supp. 36, 39. While often used as shorthand for a detailed analysis of the evidence, "shock to the

judicial conscience," when used as a substitute for such analysis, deprives a plaintiff of its right to trial by jury and constitutes an unconstitutional standard.

What is "shocking to the judicial conscience," or constitutes "a denial of justice", cannot be determined in a vacuum. For example, the the District Court in this case found the first jury's punitive damage award of $875,000 so high as to shock its conscience. When plaintiff declined to accept the District Court's remittitur, the issue of punitive damages was retried. After a three-day trial, the District Court found that "[t]he evidence in the second trial supports the jury's finding . . . the jury could have found . . . [that defendants'] net

worth was approximately $2.9 million." (Appendix B 13-14).

The judicial conscience of the District Court, shocked by the first verdict, ceased to be shocked, even by a slightly larger verdict, when a second jury returned a verdict of approximately the same magnitude as the first. In examining its conscience, the Second Circuit was bound to consider not only the fact that two separate juries reached substantially similar verdicts on the question of punitive damages, but also the fact that the District Court, whose conscience had been shocked by the first award, allowed the second award to stand. The Court of Appeals erred by substituting its conscience for that of the District Court and two juries. Even if courts of appeals are

empowered to review the size of damage awards, in the absence of a finding that a district court abused its discretion in accepting the findings of a jury, a court of appeals has no right to vacate the amount awarded, no less create its own amount.

This case makes clear that the appellate courts review jury verdicts without the guidance of an appropriate constitutional standard of review. The flippant use, as a standard, of the conclusion that an award is "so high as to shock the judicial conscience and constitute a denial of justice," invites the danger that an appellate court will dispense with its duty to review the record for a determination that: (i) the verdict is not supported by the evidence; or (ii) that it was brought about by passion

or prejudice; or finally (iii) that it resulted from an error in calculation. That, in fact, occurred in this case. Accordingly, it is important that this Court grant a writ of certiorari to determine the appropriate constitutional guidelines under which a jury verdict may be challenged for excessiveness.

B. IN CONSIDERING THE EXCESSIVENESS OF THE VERDICT, THE COURT OF APPEALS IMPROPERLY MADE AN EVALUATION OF THE RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES

As previously noted, the Second Circuit determined in Dagnello v. Long Island Railroad Co., 289 F.2d 797 (2d Cir. 1961), that in considering the size of the punitive damage award, as required by Grunenthal v. Long Island Railroad Co., 393 U.S. 156, 159 (1968), a court must "make a detailed appraisal of the evidence." Instead

of examining the evidence in detail, the Court of Appeals in this case simply looked at the ratio between compensatory and punitive damages, which was "4:100", (1:25), and found it to be "grossly disproportionate." (Appendix A 9) Based solely on that comparison, the Court then reduced the punitive damages to a proportion of no less than 4:25.

There is no requirement in either Federal or New York State law that a punitive damage award bear any special proportion to an award for compensatory damages. Morrissey v. National Maritime Union of America, 554 F.2d 19, 34 (2d Cir. 1976); Roy Export Company v. Columbia Broadcasting Systems Inc., 503 F. Supp. 1137, 1154 (S.D.N.Y. 1980) aff'd. 672 F.2d 1095 (2d Cir.) cert. denied, 459 U.S. 826

(1982); Reynolds v. Pegler, 123 F. Supp. 36, 41 (S.D.N.Y. 1954), aff'd. 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955); Doralee Estates Inc. v. Cities Service Oil Company, 569 F.2d 716, 722 (2d Cir. 1977). The Second Circuit itself has recognized this, approving punitive damages against defendants that were twenty times the size of the compensatory damage award ($60,000 punitive damages compared to $3,000 compensatory damages). Morrissey v. National Maritime Union, 544 F.2d at 34. The Court of Appeal's error of failing to make a proper evaluation of the facts, was thus compounded by its total reliance on a mathematical ratio, which should have been at most a minor factor in the decision.

The New York Court of Appeals, in Toomey v. Farley, 2 N.Y.2d 71, 156 N.Y.S.2d 840 (1956), specifically rejected the contention that punitive damages need bear any fixed relationship to compensatory damages. The Court stated, "punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit," 2 N.Y.2d 71, 83. Furthermore, the Court specifically noted that the issue of the amount to be awarded rested with the jury and that:

> There is nothing in the record to lead us to conclude that in resolving that issue they were motivated by passion or prejudice and we cannot say that the amount of damages awarded the plaintiffs does not have

> support in the record or is excessive as a matter of law.

2 N.Y.2d 71 at 83-84; Hartford Accident & Indemnity Co. v. Village of Hempstead, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979) (citing Toomey v. Farley, with approval). Under New York law, a punitive damages award may not be overturned merely as disproportionate to actual damages, but rather only if objective evidence in the record demonstrates that it resulted from passion or prejudice or that it is against the weight of the evidence.

POINT III

THE FEDERAL COURTS ARE AUTHORIZED TO CHARGE PUNITIVE DAMAGES IN AN APPROPRIATE CASE

Although punitive damages are not specifically authorized by the Lanham Act, they are similarly not specifically excluded by the Act. In such cases, it is within the power of the federal judiciary to determine whether an award of punitive damages is appropriate. Morrissey v. National Maritime Union of America, 544 F.2d 19, 24 (2d Cir. 1976); Basista v. Weir, 340 F.2d 74, 87 (3rd Cir. 1965). In this case, where petitioner's federally protected trademark was willfully violated, resulting in a fraud upon the public, punitive damages are an appropriate remedy.

This Court recently considered the question of the availability of

punitive damages in § 1983 actions. Smith v. Wade, 461 U.S. 30 (1983). Noting that the common law of torts allows the recovery of punitive damages where a defendant's conduct is outrageous because it results from an evil motive or reckless indifference to the rights of others, 461 U.S. 30, 46-47, the Court went on to note that it could "discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." 461 U.S. 30 at 48-49.

The Court of Appeals conclusion that punitive damages may only be awarded under state law deprived petitioner of a federal remedy for its federally guaranteed trademark rights.

As a consequence, the costs of proving punitive damages eventually awarded by the amended judgment of the United States District Court for the Eastern District of New York, on January 12, 1989, in the sum of $250,000, fell on the petitioner. By denying that a federal district court may charge punitive damages under the Lanham Act in an appropriate case, petitioner lost its right to attorney's fees which were otherwise properly awarded due to the willful nature of defendants' infringement. This result cannot be reconciled with the purpose of an award of attorney's fees under the Lanham Act and certiorari should be granted to correct that result.

CONCLUSION

For all of the above reasons, this Court should issue a writ of certiorari, as prayed for herein, to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

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Respectfully submitted,

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